United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6096

INDEX NO. 76-6096

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE,

INDEX NO. 76 C 861

-against-

76 C 1081

THE BOARD OF EDUCATION OF THE
CITY OF NEW YORK, et al.,

APPELLEE,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS,
LOCAL 1, SASOC, AFL-CIO, and COMMUNITY
SCHOOL BOARD DISTRICT 26,

APPELLANTS

BRIEF

MEMORANDUM OF LAW,
COMMUNITY SCHOOL BOARD
DISTRICT #26, APPELLANT

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APPELLANTS.

MEMORANDUM OF LAW,
COMMUNITY SCHOOL BOARD
DISTRICT #26, APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court, Eastern District of New York by United States District Judge Honorable Jack B. Weinstein, dated July 15th, 1976 which granted this appellant intervention in the District Court proceeding, accepted and adopted the report of the Magistrate filed July 7th, 1976 as modified so as to require any individual seeking to rely on his personal right not to incriminate himself to apply to the court by way of order to show cause for leave to plead the privilege and requiring the basis for pleading the privilege to be made a part of the moving papers. In addition said order stayed the office of Civil Rights and Department of Health Education and

Welfare from placing the information derived from its recent surveys into its computer and continued such stay for a period of fourteen (14) days pending "...the filing of a notice of appeal...." Appellant respectfully sets forth that while its application for intervention was granted the purpose of seeking intervention has been frustrated in that the appellant has not had an opportunity to be heard in the hearing which resulted in the injunction directing compliance with the survey of a HEW and OCR. Further, while appellant, its members, supervisors and administrators were made subject to the terms of the Court's injunction dated May 27th, 1976 appellant was not made a party to this proceeding until JUly 15th, 1976.

FACTS

On May 10, 1976, the United States of America instituted an action entitled, United States of America, Plaintiff, against the Board of Education of the City of New York, Isaish Robinson, Stephen Aiello, Amelia Ashe, Joseph Barkan, Robert Christen, Joseph Monserrat, James Regan, as members of the Board of Education and Irving Anker, as Chancellor of the Board of Education, Defendants to enjoin defendants from failing or refusing to furnish certain Special Compliance Reports and EEO-5 Forms sought by the Department of Health, Education and Welfare, Office of Civil Rights ("OCR:).

Plaintiff asserted its entitlement to the information sought in reliance upon its duty to investigate alleged violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. SS 2000-d et seq.

Title IX of the Education Act Amendment of 1972, 20 U.S.C. SS 1681 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. S 794, and under applicable regulations.

Hearings were held on May 21 and 24, 1976 before a special master who reported his findings to the court in a report dated May 27, 1976.

On the same day, May 27, 1976, the District Court (Weinstein, J.) permanently enjoined "the defendant Board of Education for the City of New York, the defendant members of the defendant Board and the defendant Chancellor, together with their successors in office and their agents, employees, subordinates, and all persons or entities in active concert or participation with them or subject to their supervision in this matter" from refusing or failing to distribute, complete, answer and return the Special Complaince Reports and EEO-5 Forms sought by the OCR.

Following the Court's order of May 27, 1976 and after a second hearing before the Special Master, the Council of Supervisors and Administrators, Local 1, SASOC, AFL-CIO and its officers-school principals and Community School Board, District 26 applied for and was subsequently granted intervenor status in the matter herein.

While intervenor status was granted, no new hearing nor trial of the issues was held so that neither intervenor has had an opportunity to be heard on the question of its responsibility to complete the forms in question and/or be compelled to conduct and take part in the survey or investigation in question. Rather the

court granted intervention status and for all intents and purposes adhered to its original decision directing compliance.

I

THE DIRECTION TO COMPLETE THE REPORT AND FURNISH THE INFORMATION REQUESTED IS A DIRECT VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT RIGHTS OF COMMUNITY SCHOOL BOARDS, THEIR MEMBERS, SUPERINTENDENTS, AND ADMINISTRATORS.

These surveys were instituted to ferret out any acts of discrimination or violations of the Civil Rights of various complainants in the Public School System and criminal sanctions and/or the denial of Federal Funds to the various School Boards could issue from such a violation. To demand that the various boards, their members and/or employees complete these forms, conduct portions of the investigation and supply the information to the federal agencies is a direct violation of the Fifth Amendment protection against self-incrimination of the members since the data and information might possibly result in criminal charges against the parties involved.

"The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself. The amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosectuion but also privileges him not to answer official questions put to him in any other proceeding civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. (Lefkowitz V. Turley 414 U.S. 77).

The due process clause of the Fourteenth Amendment states "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of law."

Two issues are involved here. The first is the usual protection against self-incrimination; the second is protection against self-incrimination when one is forced to provide the information against themself under economic duress.

As to the first there can be no question at this time. No one can be compelled to give evidence against himself and any evidence of any criminal activity must be suppressed if it is obtained without the proper warnings and safeguards.

As to the second, the U.S.Supreme Court has held that a judgment of contempt against a witness for refusing to answer a question on Fifth Amendment grounds must be reversed unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have a tendency to incriminate." (Malloy V. Hogan 378 US 1, 1964) In that case the burden of proving no possible incrimination through the releasing of any information was placed upon the government. "In review of a proceeding to which witness has been held in contempt through invoking the privilege against self-incrimination, the commonwealth (State) has the burden of presenting a record on which it can be determined that there is no possibility that the answer which witness would have given would lead to disclosures injurious to him."

(Taylor V. Commonwealth 338 NE2D 823 1975) In our case HEW and OCR are involved in an extended investigation of any possible discrimination in the Public School System of New York City and now seek specific facts which will aid them in determining if any School Board, its members and/or employees have engaged in acts of discrimination or of violation of the Civil Rights of various complainants. It is not a single act which is being investigated but a series of acts and events which HEW and OCR will knit together into an overall picture utilizing all of the various surveys and studies made. From this overall picture a determination of any violations will be made. In United States V. Johnson (488 F2D 1206, First Circuit 1973) the court held that the defendant in a narcotics case correctly asserted his privilege against self-incrimination when he claimed that there was danger that his testimony might provide clues to other illegal transactions. The court stated "The privilege protects not only answers which directly reveal criminal activity, but also those which may furnish a link in the chain of evidence necessary to convict." In another Supreme Court case, the Court stated that "To sustain the privilege, it need only be evident from the implications of the question...that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Hoffman Vs. U.S.,, 341 US 479, 1951.)

II

AN INDIVIDUAL OR GROUP CANNOT BE COERCED TO WAIVE ITS OR HIS FIFTH & FOURTEENTH AMENDMENT PRIVILEGES UNDER THREAT OF ECONOMIC AND/OR JOB LOSS SANCTIONS.

An individual may not be forced to make a disclosure of information which might be used later on or at that time against the individual or group. In Garitty V. New Jersey 385 US 493 1967 statements of policemen were compelled under threat of removal from office. The Court determined this violated their Fifth Amendment right against self-incrimination. The Court stated "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent...."

Gardner V. Broderic, 392 US 273 1968 reaffirmed Garitty regarding the prohibition of use of economic coercion to compel testimony. In Gardner there is alleged bribery and corruption in the police force. The policemen were advised of their Fifth Amendment rights but were asked to sign a "waiver of immunity" after being told they would be fired if they did not. Policemen refused to do so and was discharged solely because of this refusal to sign. The Court overturned their dismissal stating that it was not the loss of job that was critical but whether the threat of discharge did coerce the defendant to relinquish his Fifth and Fourteenth Amendment rights. In Lefkowitz V. Turley (414 US 70, 1973) several contractors of New York State refused to testify about existing contracts. They were threatened with the fact their existing contracts would be cancelled and they would be

disqualified from any future contracts if they refused to sign the waiver of immunity. They refused to sign and their existing contracts were terminated and they were prohibited to take any other work for five years. The courts overturned this termination and prohibition saying that "the plaintiffs disqualification from public contracting for five years as a penalty for asserting a constitutional privilege if violative of their Fifth Amendment rights."

III

WHILE HEW AND/OR OCR HAVE THE POWER TO CONDUCT DATA GATHERING INTERVIEWS AND OTHER INFORMATION COLLECTING ACTIVITIES THEY CANNOT COMPEL OTHERS TO PERFORM THESE SERVICES ON THEIR BEHALF AND ESPECIALLY AGAINST THE WISHES AND IN VIOLATION OF THE CONSTITUTIONAL GUARANTEES OF THE OTHER PARTIES.

Section 45 CFR 80.6 (c) entitled "access to sources of information" provides for access only by the responsible department official or his designee during normal business hours to such of its books, records, accounts and other sources of information, etc. Section 45 CFS 80.7 entitled "conduct of investigations" provides in pertinent part"..time to time review of the practice of recipients to determine whether they are complying with this part." Under section (c) the act provides that"the responsible department official....will make a prompt investigation .... the investigation should include where appropriate a review of pertinent practices and policies of the recipient, circumstances under which the possible noncompliance with this part occurred, and other

factors relevant to determination as to whether a recipient has failed to comply with this part."

Nowhere in these sections is there apermission to force any agency, group or department to complete any forms or to participate in the acquiring of the information which will be used against it or him. While the act permits HEW and OCR to make the necessary investigation and provides that access must be given to both HEW and OCR it nowhere requires that the subject of the survey or inquiry must provide the information or the facts sought through his, her or its own activity and participation.

That nowhere in any of the sections involved in this proceeding does it appear that the Congress of the United States contemplated the vast surveys and proceedings in which HEW and OCR are now engaged at such astronomical costs (in New York City alone the value has been placed at approximately $1,000,000.00) to the recepients of federal funds. Surely no one contemplated nor expected a four year ongoing survey which in many instances materially interfered with the education of the children, interrupted many educators in the course of their regular daily activities and resulted in a cost to the recipient of federal funds of such a vast sum. Surely no congressman intended by the insertion of these sections to afford HEW and OCR an opportunity to harass and overburden the various school districts which would receive funds with such overburdening surveys and unnecessary data gathering.

IV

HEW AND OCR HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF 45 CFR 80.7 and 80.8 (d)

That HEW and OCR has at all times dealt solely with the Central School Board in connection with this matter except for occasional dealings, off hand, with some of the school districts and/or their representatives. That HEW and OCR has set forth facts indicating compliance with sections 80.7 and 80.8 d of CFR as relates to their dealings with the Central School Board but in no instance have they indicated facts and circumstances indicating compliance with these sections as regards Community School Board - District 26 nor any of its members or respective administrators. Both HEW and OCR have failed to give Community School Board District 26 ten (10) days notice and failed to attempt to negotiate voluntary compliance by way of compromise as required by the act. Under the circumstances this injunction proceeding was premature and the court lacked jurisdiction to enforce the request of HEW and OCR against Community School Board District 26, its members and/or administrators.

V

THAT THE "ASSURANCE OF COMPLIANCE" SIGNED BY THE CENTRAL BOARD OF EDUCATION AND THE CITY OF NEW YORK ON FEBRUARY 1, 1965 IS NOT BINDING UPON THE RESPECTIVE COMMUNITY SCHOOL BOARDS AND/OR THEIR MEMBERS AND ADMINISTRATORS.

That the "Assurance of Compliance" signed by James B. Donovan, on behalf of the Central School Board in 1965 was signed before the various Community School Boards came into existence and is not

binding upon them at this time. While it still may have an effect and be binding upon the Central School Board it cannot and should not bind the various Community School Boards and their respective members. Each board and its members should be called upon to enter into an agreement with HEW and OCR and be afforded an opportunity to evaluate the responsibilities and duties imposed upon them by such an agreement.

That the relief sought is unauthorized and far in excess of the needs exhibited by HEW and OCR and set forth by them in the within proceedings. While the government claims that the defendants breached the agreement entered into as a condition for the receipt of federal financial assistance by their failure to comply with the departments proper request under department regulation 45 CFR 80.6 (See/Government Memoranda of Law/dated various and Complaint December, 1975) it also acknowledges that the sole defendant which is a party to this action, the Central Board of Education of the City of New York, has complied by distributing the various forms delivered to it by HEW and OCR. If the government in referring to defendants who have not complied is referring to the various Community School Boards their members and administrators it is respectfully submitted to this court that no school board nor administrator has been made a party to this proceeding. Under the circumstances no school board, school board member, superintendent, principal and/or administrator could be denied any constitutional privilege without first being made a party and then being permitted an opportunity to be heard.

It is further respectfully submitted to this Court that no matter what amount of money and time has been expended by the government, HEW and OCR should not be permitted to violate any of the Civil Rights of any of the Community School Boards their members and/or their respective administrators. No constitutional safeguards can be waived against any amount of money and/or time and preparation expended by the government or any of its agencies by this court. If the government has exceeded its constitutional bounds its activities must be called to a halt by this court.

VI

THAT COMMUNITY SCHOOL BOARD DISTRICT No.26, ITS MEMBERS, SUPERVISORS AND/OR ADMINISTRATORS WERE COMPELLED TO COMPLY WITH THE INJUNCTION ORDER OF THIS COURT WITHOUT DUE PROCESS.

While the report of the special master clearly found that the alleged compliance survey which is the subject of this proceeding was based upon "...various complaints alleging violations of law respecting illegal discriminations on the ground of race, color, ethnic origin, sex and handicaps in the New York City Public School System....

The special compliance reports, which are the subject of the present controversy, constitutes the final phase of this investigation and were designed to obtain detailed information relevant to ascertaining whether certain violations of law existed." See special master's report dated May 27, 1976 Pg. 6, finding #3.

While the results of this investigation and survey might disclose certain acts of the various community school boards,

their members, administrators and supervisors which could be found to constitute criminal activity (see sections 40-c and 40-d Civil Rights Law, State of New York) No community School Board, Community School Board member, Supervisors and/or Administrator was advised of his rights to counsel nor any other rights guaranteed by the constitution. Rather by letter dated May 28th, 1976 sent to "the members of the Community School Boards, the district superintendents,and principals and teachers" all were advised of theri responsibility to complete the forms. Among other things the United States Attorney's Office stated "the Court has determined that the government has the right to obtain this information ...." The United States Attorney's Office concluded "the reason for the distribution of the order is to assure that these questionnaires are fully completed as soon as possible and that you may know what you are required to do. It was also allow the government to take immediate action to compel compliance in the unlikely event someone subject to the injunction wilfully violates the order." (emphasis mine) Attached to this letter was a copy of the order of the United States District Court (Weinstein, J.) dated May 27th, 1976 which directed complaince by all of the parties involved.

Appellant respectfully sets forth to this court that, while HEW and OCR have certain investigative powers granted them by the enabling legislation, neither agency is permitted under said legislation to violate the constitutional guarantees of any citizen in the performance of its duties. Where certain rights

must bend in order for the administrative agencies involved to carry out their functions and responsibilities the persons, in this case the Community School members, whose constitutional guarantees have been violated must be given an opportunity to be heard particularly in those instances where the school board members, their administrators and supervisors were to be compelled to take part in the survey and furnish information which could be used against themselves either to withhold funds or in connection with a violation of Civil Rights proceedings said parties by reason of the due process clause of the constitution were necessary parties to the proceedings and must be given an opportunity to be heard.

In this particular proceeding no hearing or trial of the issued was had. Rather the special master in his report of May 27, 1976 stated on Page 5 at the top "on May 21, 1976 testimony No.3 taken and evidence was received and arguments were heard." Footnote #3 to which the numeral refers stated as follows: "testimony was given principally by the government's witnesses, but at certain points, the testimony of defendants' witnesses was also taken."

Appellant respectfully sets forth that the Central Board of Education interposed no full and complete defense; did not represent the interests of the various Community School Boards and particularly District No.26, its members, supervisors and/or administrators; did not present a complete and adequate defense; and this court is specifically directed to the master's report of

May 27th, 1976. A reading of this report will show and indicate that the Central Board of Education of the City of New York began to comply with the governments request even before the hearings were concluded. Under the circumstances the rights and interests of the various Community School Boards were not taken into consideration at this hearing and appellant respectfully requests that the matter be set down for a complete trial.

VII

THAT THE SURVEYS AS PRESENTED BY HEW AND OCR FAR EXCEED THE AUTHORITY GRANTED HEW AND OCR BY THE ENABLING LEGISLATION AND CONSTITUTE AN ABUSE OF DISCRETION AND POWER BY THE ADMINISTRATIVE AGENCY.

This investigation was conducted by HEW and OCR to ascertain whether or not the Civil Rights of certain alleged complainants were violated by the New York City School System, the Community School Boards, their members, administrators and/or employees. While HEW and OCR are well within their statutory mandate in conducting investigations of this nature the procedures followed and compliance requested from the investigated parties or individuals must not be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory powers. See FTC Vs. American Tobacco, 264 US 298.

The investigation in this particular instance is tantamount to a"fishing expedition" in which the government appears to be making an overall study of the system hoping to get relevant answers. Appellant submits that in an investigation of this nature where potential criminal charges could arise the surveys and

investigations must be confined to the areas of complaint which initiated the investigation.

CONCLUSION

Appellant respectfully submits to this Court that HEW and OCR initially cloaked this investigation and search for criminal activity under the mantel of "Compliance Survey." It was not until it became necessary for them to justify the scope and magnitude of the search and inquiry that the subjects of this search were advised of the criminal nature of the surveys and investigations. Even after these disclosures HEW and OCR did make the subjects of these searches (the various Community School Boards, their members, supervisors and/or administrators) parties to the proceedings but initiated an action solely against the Central Board of Education of The City of New York. The Central Board thereafter interposed a defense but during the proceedings consented to the surveys and investigation and forwarded the various forms to the Community School Boards. Thereafter followed the May 28th, 1976 letter directing compliance with the Court injunction of May 27th, 1976 attached. No School Board, nor member, nor superintendent, nor administrator was allowed a hearing nor given the opportunity to challenge the survey and investigation. While both intervenors were granted intervention after an informal hearing between the attorneys and the special master the initial hearing was not reopened; neither intervenor had an opportunity to hear evidence or present its case.

Appellant respectfully submits that the actions and particularly the subterfuge engaged in by HEW and OCR constitute a gross

abuse of discretion and responsibility and this court must bring a halt to this activity. While HEW and OCR may make investigations and/or require compliance surveys we respectfully submit that neither these government agencies nor any other should be permitted to conduct a criminal investigaiton and cloak the same under the mantle of a compliance survey or some other permitted purpose. This Court must declare the investigations conducted by HEW and OCR in this particular instance unconstitutional, illegal and suppress the same.

While we do not refute HEW and OCR'S power to conduct compliance surveys we vehemently object to the manner in which the investigations which were admittedly criminal investigations were conducted in this particular instance and we ask this court to place proper restrictions upon the activity of these agencies in order to avoid establishing a precedent which could result in numerous violations of the Civil Rights and constitutional guarantees of the respective citizens of this nation.

DATED: BROOKLYN, N.Y.
July 28th, 1976

Cosmo J. Di Tucci

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UNITED STATES COURT OF AMERICA
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

-and-

Appellee,

COUNCIL OF SUPERVISORS AND ADMINSTRATORS, LOCAL 1, SASOC, AFL-CIO and COMMUNITY SCHOOL BOARD, DISTRICT 26,

Appellants

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF KINGS

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 18 Willow Place, Brooklyn, New York.

That on July 29th, 1976 deponent served the annexed Memorandum of Law on DAVID G. TRAGER, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York; FRANKLE & GREENWALD, Attorneys for Intervenors, 80 Eighth Avenue, New York, New York; PAUL WINDELS, JR., ESQ., 51 West 51st Street, New York, New York and BERYL KUDER, ESQ., Assistant Corporation Counsel, Corporation Counsel of New York, Municipal Building, New York, New York, Room 1735 , the addresses being those designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me July 29th, 1976

Cosmo J. DiTucci

COSMO J. DITUCCI
Notary Public, State of New York
No. 41-0971265
Qualified in Queens County
Commission Expires March 30, 1977

Margaret Guthrie

MARGARET GUTHRIE